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No. 84-832

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HYBUD EQUIPMENT CORP. & BUDOFF IRON & METAL CO.,
Petitioners-Plaintiffs,

v.

CITY OF AKRON, OHIO, JOHN S. BALLARD, RAY KAPPER, ELSIE REAVEN, JAMES R. WILLIAMS, TIM DAVIS, VINCENT CIRACO, ROBERT L. GOEHLER, REGINALD K. BROOKS, KATHLEEN GREISSING, ROBERT J. OTTERMAN, MICKEY ERITANO, JR., JOHN V. FRANK, DON PLUSQUELLIC, WILLIAM C. GRIMM, ROBERT EDWARDS, COUNTY OF SUMMIT, OHIO, MARK RAVENSCRAFT, TED COLES, DON STEPHENS, AND OHIO WATER DEVELOPMENT AUTHORITY,
Respondents-Defendants.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

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REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioners file this reply brief in support of their petition for *certiorari* pursuant to Rule 22.5 of this Court's Rules.

I. STATE ACTION ISSUE

A. New Standard Adopted By Sixth Circuit

Respondents have asserted in dramatic fashion that the Sixth Circuit did not adopt a new standard, but simply applied to the facts of this case the standard of *City of Lafayette, La.* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Community Communications Co., Inc.* v. *City of Boulder, Colo.*, 455 U.S. 40 (1982). They incorrectly assert that petitioners based their argument only on the fact that the Sixth Circuit found that the OWDA statute did not constitute a clearly articulated and affirmatively expressed state policy.

Respondents' argument is designed to make the decision below seem insignificant, but their argument ignores the rationale adopted by the Sixth Circuit. It is true that the Sixth Circuit's holding that respondents' actions are within the state action exemption uses the rubric that they satisfy the requirement of a "clearly articulated and affirmatively stated policy to displace competition." (Petitioners' Appendix A at 23a.) However, respondents do not even address, much less explain, the numerous passages in the Sixth Circuit's opinion which make clear that the court reached this conclusory holding by adopting and applying an entirely new standard to the facts of this case.

That the Sixth Circuit evaluated and adopted a new standard is clear from the explicit language of its opinion.

> The plurality in *Lafayette* stressed that an exacting standard for municipalities was necessary to maintain economic order within a state and avoid a multitude of conflicts with national policy. . . . This emphasis on economic atomization within a state suggests that a different standard might apply to an agency with state-wide jurisdiction. (Petitioners' Appendix A at 13a.)
>
> The validity of the district court's finding that OWDA's statutory mandate met the standard of a

> clearly articulated and affirmatively expressed state policy turns on a crucial ambiguity in *Lafayette* and *Boulder*. In those decisions the Court left unclear the degree of specificity in state law necessary to satisfy the standard applied to a nonsovereign state representative. (Petitioners' Appendix A at 17a-18a.)

Speaking of this "ambiguity," the court said that "this problem" is

> . . . whether the interpretation of an ambiguous or open-ended regulatory statute by a state agency can ever constitute "state action" in and of itself under the *Parker* v. *Brown* doctrine. . . . [S]tate regulatory statutes are often drafted in general terms and delegate broad policymaking discretion to a state regulatory agency. (Petitioners' Appendix A at 18a n.9.)

Thus the Sixth Circuit obviously believed, and it so stated, that the question whether respondents' action was within the state action exemption was *not* answered by this Court's decisions in *Lafayette* and *Boulder*. To overcome what the court perceived to be an ambiguity, it adopted a new standard, which focuses not on what the legislature intended but on a court's view of reasonableness:

> If the challenged restraints are reasonably related to an agency's express powers and reasonably designed to promote the state aims within a designated field of regulation, they can be found to result from a "clearly and affirmatively expressed state policy" to displace competition. (Petitioners' Appendix A at 21a.)

Thus a review of the Court's language—and the reasoning process it used—demonstrates that the Sixth Circuit discussed, formulated and adopted a new standard to fill what it perceived to be a gap in this Court's holdings in this area. This new standard—by focusing on a court's finding that an action is "reasonably related" to agency powers and "reasonably designed" to promote state aims, instead of focusing on what was the legislative intent—puts courts in the business of making decisions very similar

to those made in the era of substantive due process. This is precisely the concern expressed by Justice Rehnquist in his dissent in *Boulder,* 455 U.S. at 60, 67-68.

B. The Authority To Finance Projects By Issuing Bonds Does Not Imply Authority To Restrain Competition

Respondents' suggest that the authority of a state agency to issue revenue bonds for any facility implies that the state has affirmatively granted that agency the power to protect that facility from competition. The error of such an argument in light of *Boulder* is demonstrated by looking at its results. There are other state agencies to which the Ohio legislature has given general financing powers similar to OWDA's, such as the Ohio Development Financing Commission ("ODFC") (Ohio Rev. Code § 122.39, *et seq.*), whose mission is to aid in the financing of all types of local businesses such as shopping centers, restaurants, factories and the like. This statute contains the same type of general authorizing and enabling language as in the OWDA provisions. Following respondents' reasoning, this agency, too, could become involved in local arrangements to insulate these private businesses from competition and thus ensure their financial success.

But surely it would be inconsistent with the principles of *Boulder* to infer that a grant of authority to assist such facilities with revenue bonds involved a decision by the legislature to allow the financing agency to foreclose other restaurants, shopping centers, or factories from competing with the financed project. To infer such from an agency's *financing* authority, whether it is OWDA or ODFC or any of thousands of similarly authorized state bond-issuing agencies in this country, is to ignore legislative intent in favor of a court's view of what is reasonable to accomplish public goals. This is not consistent with this Court's holdings in *Lafayette* and *Boulder.*

C. Respondents' Repetitive Argument That Municipalities Have Often Monopolized Waste Disposal As An Exercise Of The Police Power Is Irrelevant To This Case.

Respondents' brief is largely devoted to the proposition that municipalities have often monopolized waste disposal and that numerous non-antitrust cases have upheld such activities as appropriate exercises of the police power. These assertions are completely irrelevant to this case for several reasons.

First, this argument was not part of the Sixth Circuit's rationale in holding that the respondents' actions were within the state action exemption. This argument is part of respondents' effort to deflect attention from what that court actually said. For instance, respondents cite numerous police power cases on pages 11 and 12 of their Opposition, but none of those cases was cited in the Sixth Circuit's opinion on the state action exemption issue. The Sixth Circuit's only reference to these cases, cited on pages 12-13 of the Opposition, was in its discussion of the Tenth Amendment issue in its *first* decision of this case, the one vacated by this Court. The Tenth Amendment issue is no longer in this case; it was abandoned as a ground of decision by the Sixth Circuit on its further consideration of this case following this Court's remand.

Second, reliance on historical exercises of the police power by municipalities does not meet this Court's standards for determining whether the state action exemption from the Sherman Act is applicable. As detailed in this Court's prior decisions, the standard is whether the State has adopted a policy to displace competition. It is not whether state agencies or municipalities have taken certain actions historically or whether such actions are legal within delegation-of-power principles. That such historical actions are irrelevant to satisfying the standard of *Boulder* is evident in the fact that the two Ohio cases cited by respondents which have upheld municipal monopolization of solid

waste disposal[1] have done so on the basis of the *home rule provisions* of the Ohio Constitution. But, as this Court held in *Boulder,* such broad delegation of power to municipalities through home rule provisions does not meet the requirements for the state action exemption.

Third, the argument is not applicable to the facts here. The City Ordinance being challenged goes substantially beyond any exercise of historical police power based on concern for public health. Respondents have persisted in ignoring the key difference between the public need for the RES project itself and the separate *financial* purpose of the ordinance. The ordinance, as reflected on the face of its preamble[2] and as the Sixth Circuit has found,[3] was enacted not because of any health concern but because of a need to assure the financial security of the RES. The ordinance goes beyond waste disposal to a completely separate, commercial market, the separation and sale for recycling of valuable materials from solid waste. Respondents' actions challenged here have been motivated purely by commercial concerns. The RES will do with the recyclable materials exactly what petitioners have done for years and want to continue doing: separating them out from solid waste destined for disposal and selling them in established scrap markets.

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[1] State ex rel. Moock v. Cincinnati, 120 Ohio St. 500, 166 N.E. 583, *cert. denied,* 280 U.S. 578 (1929); City of Canton v. Van Voorhis, 61 Ohio App. 419, 22 N.E. 2d 651 (1938), *appeal dismissed,* 135 Ohio St. 319 (1939).

[2] Petitioners' Appendix J at 128a.

[3] Petitioners' Appendix A at 3a, Petitioners' Appendix E at 62a.

II. THE TAKING ISSUE

The Challenged Ordinance Contemplates The Uncompensated Taking Of Private Property For The City's Commercial Benefit Instead Of Destroying Private Property As An "Incidental" Result Of Regulating A "Nuisance".

Respondents seek to evade petitioners' taking argument by characterizing the challenged ordinance as merely aimed at regulating a "nuisance," with the purely incidental result of the destruction of petitioners' property. Respondents' reliance on this argument and on *California Reduction Co.* v. *Sanitary Reduction Works*, 199 U.S. 306 (1905), and *Gardner* v. *Michigan*, 199 U.S. 325 (1905), is misplaced. Unlike *California Reduction* and numerous other cases, the question here is not whether a valid exercise of the police power to control a nuisance, with the incidental result of destroying private property, is compensable. Here, as the Sixth Circuit itself recognized, the open and recognized purpose of the challenged ordinance was for the City to take the solid waste and valuable recyclables collected by petitioners and other collectors and use them for the City's generation of revenues.[4] It was part of respondents' plan that the RES would generate fees in three ways: from the generation and sale of energy, from the "tipping" fees paid by collectors depositing waste at the facility, and from the sale of recyclables recovered from the solid waste.[5] As the court said, respondents "concede that the agreement and the ordinance were enacted upon the urgings of the project's underwriters in order to guarantee the project's financial success." (Petitioners' Appendix E at 66a.)

Moreover, respondents concede and the Sixth Circuit found[6] that the recyclable materials in the "mixed" waste stream are (1) valuable and (2) *not* a threat to health or

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[4] Petitioners' Appendix A at 6a, Petitioners' Appendix E at 62a-65a.

[5] Petitioners' Appendix E at 65a.

[6] Petitioners' Appendix E at 64a, 78a.

safety. If the objective of the ordinance were to regulate a "nuisance," as respondents claim, the ordinance properly and logically would allow the private collectors to separate out the valuable recyclables and deliver to the City the remaining "nuisance" waste materials. Materials that petitioners contract with their customers to purchase from them for recycling by definition are not going to be disposed of in a landfill. The ordinance, however, does not allow petitioners to separate out and keep or sell the recyclables, but instead requires all such materials to be turned over to the City in contemplation of the City's selling the valuable recyclables for its own benefit. Respondents' efforts to portray this scheme as a "nuisance" regulation with the incidental result of destroying property is plainly disingenuous.

Respondents further assert the arcane position that because petitioners' business is a "privilege" conferred by the City, no compensable taking can occur. (Opposition at 27-29.) Virtually every business activity is licensed and/or permitted by government, and all in one manner or another are regulated. The fact that a city can grant or deny permits or licenses or otherwise regulate the operation of a business can hardly mean that the city can take without compensation and for its own benefit the property of the business. The use of the right/privilege distinction to permit otherwise unconstitutional actions has been rejected by this Court in other contexts[7] and has no bearing on this case. This Court has never held that the power to regulate includes the right to take private property without compensation for the purposes of enhancing the government's revenues.[8]

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[7] See *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).

[8] Moreover, if the City did occupy the waste collection and disposal field, the City would have to bear the costs of that endeavor, whether by paying its own employees or contracting the business out to private companies. Here, however, the City reaps all the benefits by forced appropriation of petitioners' property, but bears none of the costs.

CONCLUSION

The Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

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